



Original Decision:

Subject: Waste Management – Industrial Action Update

Report of: Chief Executive, Chief Finance Officer and City Solicitor

Relevant Cabinet Member: Councillor Ian Ward, Leader of the Council

Report author: Clive Heaphy, Chief Finance Officer
Kate Charlton, City Solicitor and Monitoring Officer
Rob James, Acting Director Neighbourhoods
Dawn Hewins, Director Human Resources

Date of decision: 12th February 2019

Call-in:

Date of call-in 15th February 2019

O&S Committee Co-ordinating O&S Committee

Executive Response:

Report author: Kate Charlton, City Solicitor and Monitoring Officer

1 Executive Summary

- 1.1 This report is an addendum to the Public report considered by Cabinet on 12th February 2019: *Waste Management – Industrial Action Update*. This decision was subsequently called-in by the Co-ordinating O&S Committee, and is to be reconsidered by Cabinet on 20th February 2019. The report of the Co-ordinating Overview & Scrutiny Committee is attached.
- 1.2 This Executive Response sets out the additional information regarding legal advice presented verbally at the meeting on 12th February, but not included in the original report.
- 1.3 At the Cabinet meeting on 12th February, Cabinet agreed the revised recommendations set out in section 2 below.
- 1.4 Cabinet are asked to reconsider the decision made in public on 12 February 2019 in the light of concerns raised by the Co-ordinating Overview and Scrutiny

Committee and taking into account the explanation given by Andrew Burns QC at the Cabinet meeting on 12th February 2019, now set out in the Legal Implications section below.

2 Recommendations (as amended at Cabinet on 12th February 2019)

- 2.1 Note the contents of this Report and the accompanying Private Report.
- 2.2 Note the options available to the City Council for managing the current Industrial Action as set out in section 7 of this report.
- 2.3 Note the advice of the Monitoring Officer and the Chief Finance Officer as set out in this report and in the private report.
- 2.4 Note that Cabinet will be required to take into account any recommendations made by the District Auditor.
- 2.5 Note, as set out this report, that Unite the Union have been offered binding arbitration and have declined. UNISON has not yet been offered this route and ACAS talks with UNISON continue. In such circumstances, the decision of Cabinet on 15th January 2019 was to commence the legal processes for a court application with a view to preventing the unlawful industrial action of both Unite the Union and UNISON from continuing.
- 2.6 Note the updated Contingency Plan attached at Appendix 2
- 2.7 Consider the benefits and risks associated with each option as set out in this report and the accompanying private report, and approve one of the following:
 - 2.7.1 Option 1 – do nothing and await the outcome of the employment tribunal litigation or any litigation issued by the council as set out in this report; or
 - 2.7.2 Option 2 - to offer a one-off payment (as set out in para 7.2 this report) to the members of Unite the Union to settle the current employment litigation between the Council and Unite the Union; or
 - 2.7.3 Option 3 – to make a payment (as set out in para 7.3 of this report) to resolve the dispute; this option is not recommended due to significant legal and financial risks; or
 - 2.7.4 Option 4 – re-affirm the decision reached at Cabinet on 15th January 2019 and to issue forthwith injunction proceedings as set out in Cabinet Report 15th January 2019 (Appendix 1).
 - 2.7.5 Option 5 –
 - i) To approve formal offers (as set out in the private report) to be presented to Unite the union and UNISON via ACAS conciliation on Tuesday 12 February 2019 to settle the employment tribunal litigation issued against the Council by Unite the Union and the early conciliation claims issued by UNISON and, if those offers are not accepted by close of business on Tuesday 12 February 2019, to commence the legal

process for a court application with a view to preventing further unlawful industrial action by both Unite the Union and UNISON.

ii) To note that the offer will be made subject to the Council's call in requirements and any injunction proceedings issued in the High Court by the Council will be subject to the Council's call in period, however any pre action correspondence with solicitors acting for Unite the Union or UNISON regarding the proposed injunction proceedings will take place within this call in period and does not negate a call in.

- 2.8 Delegate to the Head of Paid Service, Chief Finance Officer, the City Solicitor and the Acting Director Neighbourhoods, acting together, to implement the decision arising from consideration by Cabinet of options 2.7.1 – 2.7.4 above in accordance within the financial and legal terms set out in this report and in the Private report in the shortest time possible, having regard to the relevant call in period.

3 Legal Implications

- 3.1 The Co-ordinating O&S Committee ask the Cabinet to reconsider its decision as outlined above; in particular ensuring that full consideration is given to the explanation given by Andrew Burns QC at the Cabinet meeting on 12th February.
- 3.2 This was set out verbally at the meeting on 12th February, but not included in the original report. It is therefore replicated below, for Cabinet's consideration:

"In relation to temporary injunction, it's compulsory to apply for a temporary injunction in these circumstances before you apply for a permanent one. But, in an industrial action situation, the temporary injunction usually brings it into the whole matter because if a Court temporarily suspends a strike, or industrial action, usually before the Court process can get down the road a few weeks or months further to have a full trial, the industrial dispute, by that time, has either petered out or has been settled. So, generally, industrial disputes are solved after temporary injunctions are granted and it's a temporary injunction which is the proposal that is on the table.

Option 5 which has been put forward does seem to be a practical solution for the Council for this reason. Before you take any legal action against a party, Unite or anybody else, you need to give a proper opportunity to try and settle a case as part of the overriding objective that's built into the Court Rules and so, after the Cabinet took the decision on the last occasion to apply for an injunction, it quite properly responded to the union's indication that a settlement might be possible at ACAS and use the opportunity between then and now to try and reach a consensual settlement rather than one that's been fought in Court and the Courts are prepared, and, indeed, encourage, parties to try and settle matters outside of Court and only go to Court for an injunction if settlement cannot be reached.

Of course, where we are today is that the ACAS talks have, so far, been unsuccessful and; second, Unite have indicated that they will now be calling for an escalation to the action, going from industrial action to strikes and, therefore, the Council is facing a more

acute situation and, therefore, it's quite reasonable to reassess whether now is the time that Court action is called for being that the Council is facing a more serious situation of strike.

The combination in option 5 looks to be a good legal approach because it must be reasonable to give Unite a last chance to settle for a proper amount, that's an option 2 amount, which is a proper and reasonable assessment of what the commercial value of their employment tribunal claims are, before pressing the button for Court action and so those two are, I think, rightly linked together. Just going for option 2 or just going for option 4 is a blunt instrument in terms of Court terms. One should be looking to have the option 2 reasonable settlement, if possible, one that is in the financial interests of the Council but it is important, in my view, to have option 4 as the next stage, the backstop, because without option 4 as something the Council is willing to go for over the next few days, there is little impetus for the other party to negotiate to settle. Having option 4 effectually gives you the opportunity to try and settle this matter which you haven't had up until now because you weren't just about to press the button for Court action.

So, it's been, in summary, a temporary injunction is what is on the cards. It's been reasonable to take ACAS as far as it can up until now and make the efforts to try and find a resolution which suits the Council's finances and is something that will reduce the ongoing costs of industrial action and, as of today, having tried ACAS and not having been successful, it looks like industrial action must be stopped by a Court action, if possible, but if it's possible before that happens for a settlement to be reached with Unite, this afternoon, then all the better."

3.3 Later in the meeting, Andrew Burns QC also referred to the reasons for the advice that the strike is brought for an unlawful reason:

"The decision in option 5 is about whether or not the Council should use its legal powers ... to prevent a strike action, industrial action, which is brought for an unlawful reason. The reason for the strike is effectively to promote discrimination between different unions and that is a reason which is excluded from protection under the strike and industrial action legislation"